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City Growth Sdn Bhd & Anor v The Government of Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–148 OF 2004

B RAUS SHARIF J
1 SEPTEMBER 2005

Administrative Law — Remedies — Judicial review — Whether orders made by deputy public prosecutor to seize funds in banking accounts reviewable — Anti-Money Laundering Act 2001 s 50(1)

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The applicants sought leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 ('the RHC') for an order of certiorari to quash an order dated 5 July 2004 made by the deputy public prosecutor and served on Hong Leong Bank Bhd ('the Hong Leong order') and EON Bank Bhd ('the EON Bank order') (collectively referred to as 'the said orders'). The said orders purport to effect a seizure of, inter alia, movable property in the banking accounts of the applicants pursuant to s 50(1) of the Anti-Money Laundering Act 2001 ('AMLA'). The crucial question that needed determination was whether the said orders of the deputy public prosecutor pursuant to s 50(1) of AMLA was decision reviewable by way of judicial review.

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Held, dismissing the application for leave:

(1) The order of the deputy public prosecutor is not reviewable under O 53 of the RHC. Section 50(1) of AMLA is part and parcel of the investigation process into an offence under s 4(1) of AMLA. In order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s 50(1) of AMLA was enacted to enable the Public Prosecutor or his deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders, the deputy public prosecutor was merely exercising a function under AMLA (see para 12).

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(2) Otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review (see para 15).

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[Bahasa Malaysia summary

Pemohon-pemohon memohon kebenaran mahkamah untuk memulakan satu tindakan di bawah A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk

satu perintah certiorari membatalkan perintah bertarikh 5 Julai 2004 yang dikeluarkan oleh Timbalan Pendakwa Raya dan disampaikan kepada Hong Leong Bank Bhd ('perintah Hong Leong') dan EON Bank Bhd ('perintah EON Bank') (dikenali secara kolektif sebagai 'perintah-perintah tersebut'). Perintah-perintah tersebut kononnya mempunyai efek penyitaan, di antara yang lain, harta alih di akaun-akaun bank pemohon-pemohon, mengikut s 50(1) Akta Pencegahan Pengubahan Wang Haram 2001 ('AMLA'). Persoalan yang penting yang harus diputuskan ialah sama ada perintah-perintah timbalan pendakwa raya tersebut yang bertarikh 5 Julai 2004 berikutan s 50(1) AMLA ialah satu keputusan yang dapat dikaji semula melalui kajian semula kehakiman.

Diputuskan, menolak permohonan pemohon:

(1) Perintah yang dikeluarkan oleh timbalan pendakwa raya tidak boleh dikaji semula di bawah A 53 k 3 KMT. Seksyen 50(1) AMLA adalah perkara yang mesti ketika menjalankan proses siasatan ke atas satu kesalahan di bawah s 4(1) AMLA. Untuk memudahkan penyiasatan ke atas kesalahan mengubah wang haram, undang-undang telah memberikan Pendakwa Raya kuasa untuk membantu pegawai penyiasat. Dengan jelas, s 50(1) AMLA diperbuat untuk membolehkan Pendawa Raya ataupun timbalannya membuat perintah penyitaan harta alih di bawah milikan institusi-institusi kewangan supaya tidak membenarkan pengeluaran, atau berurusan ataupun menyelesaikan sebarang harta atau sebahagian darinya sebelum perintah itu dibatalkan atau diubah. Dengan itu, pengeluaran perintah-perintah tersebut oleh timbalan pendakwa raya adalah hanya menjalankan tugas di bawah AMLA (lihat perenggan 12).

(2) Kalau tidak, jika kesemua keputusan-keputusan dan tindakan pihak berkuasa awam yang seperti ini dapat dirujuk untuk satu kajian oleh mahkamah, maka jentera kerajaan berkemungkinan tidak dapat berfungsi secara licin. Proses penyiasatan segala agensi undang-undang akan terbuka kepada kajian semula kehakiman dengan kerap (lihat perenggan 15).]

Notes

For cases on remedies for judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 177–178.

Cases referred to

Ahmad Azam bin Mohamed Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86 (refd)

R v Sloan [1990] 1 NZLR 474 (refd)

Legislation referred to

Anti Money Laundering Act 2001 ss 4(1), 44, 50(1)
Cooperative Societies Act 1993
Emergency (Crime Prevention and Public Safety) Ordinance 1969 s 3(1)
Rules of the High Court 1980 O 53 r 3

V Sithambaram (Chetan Lachman Jethwani with him) (Sri Ram & Co) for the applicant/appellant.

Abdul Rahim Uda (Azizah Hj Nawawi with him) (Senior Federal Counsels, Attorney General's Chambers) for the respondent.

Raus Sharif J:

[1] This is an application by City Growth Sdn Bhd and Azam dan Azan Sdn Bhd ('the applicants'), for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 ('the RHC'). Basically, the applicants are seeking for an order of certiorari to quash the order dated 5 July 2004 made by the deputy public prosecutor and served on Hong Leong Bank Bhd ('the Hong Leong order') and EON Bank Bhd ('the EON Bank order') (collectively referred to as 'the said orders'). The said orders purport to effect a seizure of, inter alia, movable property in the banking accounts of the applicants pursuant to s 50(1) of the Anti-Money Laundering Act 2001 ('AMLA').

[2] There are three other related matters involving the Hong Leong order. There are:

(i) Kuala Lumpur High Court Judicial Review application No R1–25–151 of 2004 filed by Dynasty Domain Sdn Bhd against the Government of Malaysia ('the Dynasty Domain application');

(ii) Kuala Lumpur High Court Judicial Review application No R2–25–147 of 2004 filed by Prestigious Autoworld Sdn Bhd against the Government of Malaysia ('the Prestigious Autoworld application'); and

(iii) Kuala Lumpur High Court No R2–25–147 of 2004 filed by Luar Kota Development Sdn Bhd against the Government of Malaysia ('the Luar Kota application').

[3] By an order of court given on 21 February 2005, the application herein and Prestigious Autoworld application were ordered to be transferred and heard together with Dynasty Domain application and the Luar Kota application.

[4] The facts leading to the four applications are these. On 26 March 2004, one Tee Yam was arrested by the police and detained pursuant to s 3(1) of the Emergency (Crime Prevention and Public Safety) Ordinance 1969. While he was under police detection, the police on or about 5 April 2004 served an order under s 44(1) of AMLA on Tee Yam ('the Tee Yam s 44 order'). Subsequently on or about 14 April 2004, Tee Yam's wife, Chia Mee Sim, was also served with a similar order under s 44(1) of AMLA

[5] The police then relied on the existence of Tee Yam s 44 order to freeze the banking and financial accounts of companies linked to Tee Yam, which includes the applicants herein, Dynasty Domain Sdn Bhd, Prestigious Autoworld Sdn Bhd and Luar Kota Sdn Bhd.

[6] By operation of law, the Tee Yam s 44 order lapsed on 4 July 2004. However on 5 July 2004, the day after the Tee Yam s 44 order lapsed, the deputy public prosecutor issued and served the Hong Leong order and EON Bank order pursuant to s 50(1) of AMLA to the applicants herein. The Hong Leong order was also served on Dynasty Domain Sdn Bhd, Prestigious Autoworld Sdn Bhd and Luar Kota Sdn Bhd.

[7] Hence, these companies filed their application for leave for judicial review. Subsequently, the applications were served on Attorney General Chambers pursuant to O 53 r 3(3) of the RHC. When the applications came up for hearing, Senior Federal Counsel Dato' Abdul Rahim bin Uda (Puan Azizah bte Haji Nawawi with him) appeared for the Attorney General. He raised several preliminary objections. His objections were:

(i) the deputy public prosecutor, in exercising the power of the public prosecutor was merely performing a statutory function and did not make a decision;

(ii) that the decision of the deputy public prosecutor was not a final determination of the issue at hand;

(iii) that the said orders were issued in the exercises of a non decision making duty;

(iv) that the revision of the said orders would be against public policy; and

(v) that the present proceedings are an abuse of process of the court.

[8] Learned counsel for all the applicants contended that the said orders of the deputy public prosecutor under s 50(1) of AMLA is amendable to judicial review because:

(i) The deputy public prosecutor was performing a public duty by enforcing the provision of AMLA;

(ii) The source of that the deputy public prosecutor power is statutory, ie AMLA; and

(iii) The deputy public prosecutor in exercising the powers conferred by AMLA is under an obligation to act judiciously.

[9] Thus, the crucial question that need determination is whether the said orders of the deputy public prosecutor dated 5 July 2004 pursuant to s 50(1) of AMLA is decision reviewable by way of judicial review.

[10] In order to decide on the issue, it is necessary, and for ease of reference, to produce a copy of the order issued by the deputy public prosecutor. The order reads as follows:

ANTI-MONEY LAUNDERING ACT 2001

(ORDER UNDER SUBSECTION 50(1))

TO: EON BANK BHD

11TH FLOOR, WISMA CYCLE & CARRIAGE

288, JALAN RAJA LAUT

KUALA LUMPUR

WHEREAS I, BUDIMAN LUTFI BIN MOHAMED being satisfied

(Name of Public Prosecutor/Deputy Public Prosecutor)

on the information given to me by DSP SURESH KUMAR G SUPPIAH

(Name of Investigating Officer)

that the movable property including any monetary instrument or any accretion to it, as setout below:-

1) Azam & Azan S/B — CA A/C No 1610000029661

2) Azam & Azan S/B — HAD A/C No 161000029678

3) City Growth S/B — (i) HAD No: 18100050991 (ii) HDA No 18100051000 (iii) HAD No: 18100051017 (iv) HAD No: 18100051031 (v) HAD No 18100051048

is evidence in relation to the commission of an offence under subsection 4(1) of the Anti-Money Laundering Act 2001 ('the Act').

NOW PURSUANT to subsection 50(1) of the Act, it is hereby ordered that you, your employee or your agent are not to part with, deal in, or otherwise dispose of such property or any part of it until this Order is otherwise revoked or varied.

TAKE NOTICE THAT failure to comply with this Order is an offence under the Act.

Date: 5 July 2004

sign

Signature of Public Prosecutor

Deputy Public Prosecutor

[11] From the above, it can be seen that the deputy public prosecutor's order was in pursuant to s 50(1) of AMLA. Section 50(1) of AMLA is in the following words:

> (1) Where the Public Prosecutor is satisfied on information given to him by an investigation officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

[12] Looking at the order of the deputy public prosecutor as well as the provision of s 50(1) of AMLA, I am of the view that the order of the deputy public prosecutor is not reviewable under O 53 of the RHC. To me, s 50(1) of AMLA is part and parcel of the investigation process into an offence under s 4(1) of AMLA. I appears that in order to facilitate the investigation into the offence of money laundering, the law has

provided with the public prosecutor the power to assist the investigating officer. Clearly, s 50(1) of AMLA was enacted to enable the public prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders the deputy public prosecutor was merely exercising a function under AMLA.

[13] It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said:

> ... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural... or the exercise of a function rather than a power... Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

[14] Similarly, in *Ahmad Azam bin Mohamed Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86, I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O 53 of the RHC.

[15] Likewise in this case, the order of the deputy public prosecutor under s 50(1) of AMLA is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review. To borrow the words of Justice Hardie Boys in *R v Sloan* 'that cannot have been the intention of Parliament.'

[16] It is submitted by learned counsel for all applicants that the issuing of the s 50(1) order, the deputy public prosecutor has crippled their business and has further failed to appreciate that the said orders would subject them and its directors and officers to liabilities resulting from their inability to utilize its funds. But as stated earlier, the s 50(1) order is to secure the evidence for the purpose of criminal prosecution under s 4(1) of AMLA. It is not an administration decision but a decision in relation to criminal investigation. Thus, the rights of all applicants in the four cases lies in the criminal, as well as civil law and not in an administration action. The deputy public prosecutor was performing his duties under s 50(1) of AMLA and cannot be made accountable by way of judicial review.

[17] For the abovesaid reasons, the four applications for leave is refused with costs.

Application for leave dismissed.

Reported by Sally Kee